Of more import is the consequence of uprooting this child from the surroundings and from relatives to whom he had grown accustomed since 1977. We are however inclined to agree with learned counsel for respondent that what was said by Eve J. in *Re Thain* (1) would also apply here. There, the child's mother had died and the father, being in the Royal Air Force, had for a long time not been able to look after the child. The child had been brought up by her aunt (her mother's sister) and uncle, and it has been suggested that it would be unkind to the child, when the father was eventually in a position to give her a home, to take her from her foster parents.

Eve J., at page 684 said:-

"It is said that the little girl will be greatly distressed and upset at parting from Mr. and Mrs. Jones. I can quite understand it may be so, but, at her tender age, one knows from experience how mercifully transient are the effects of partings and other sorrows, and how soon the novelty of fresh surroundings and new associations effaces the recollection of former days and kind friends, and I cannot attach much weight to this aspect of the case.

As I said at the commencement of my judgment, I am satisfied that the child will be as happy and well cared for in the one home as the other, and in as much as the rule laid down for my guidance in the exercise of responsible jurisdiction does not state that the welfare of the infant is to be the sole consideration but the paramount consideration, it necessarily contemplates the existence of other conditions, and amongst these the wishes of an unimpeachable parent undoubtedly stand first."

We are also satisfied that the learned trial Judge had acted on the right principles, having in mind always that the paramount consideration shall be the welfare of the child.

Financially and otherwise the suitability of either side to be satisfactory custodians of Nantha appear to be equal, and no doubt before the advent of the stepmother, it may well be that the learned Judicial Commissioner would have decided not to order a change of custodian. But we agree with him that the care and attention of the natural mother can be reasonably expected to be superior to that of a step-mother, particularly one who has a child of her own and with every prospect of additions to the family. It would be reasonable to expect that in the tussle for love and affection, the step-child would be the loser. Giving custody to the grandmother, in the circumstances, would not improve the position.

We therefore dismissed this appeal with costs.

Appeal dismissed.

Solicitors: *E. Ramasamy & Co.; G. F. Nelson & Co.*

TAHANSAN SDN. BHD. v. TAY BOK CHOON

[F.C. (Salleh Abas L.P, Wan Suleiman & Seah F.JJ.) July 11 & September 17, 1984]

[Kuala Lumpur – Federal Court Civil Appeal No. 55. of 1983]

Company Law – Winding-up of Company – Just and equitable ground – Affidavit evidence – Question of fact – Whether oral evidence should have been taken – Companies (Winding-up) Rules, 1972, rr. 26 & 30 – R.H.C. 1980, O.3 r.2(3) & O.38 r.2(3) – Companies Act 1965, ss. 221(2)(c) & 289(1).

This was an appeal from the decision of the High Court reported at [1984] 1 M.L.J. 204. The learned trial judge had made a winding-up order on just and equitable grounds under section 216(1)(i) of the Companies Act. He held that the respondent had joined the company as a shareholder on the basis that he and his son would be given an equal share in the management of the business and that the other shareholders would not use their majority to outvote him on major issues. On appeal it was argued that such an underlying obligation had not been proved and was denied by the appellants.

Held: (1) in the face of the denial that the agreement was ever made, the trial judge should have heard oral evidence before deciding whether the alleged agreement was ever made;

(2) even if the trial judge had been right in his decision to make an order on mere affidavit evidence, he should have so indicated to the parties and given them an opportunity to reach an agreement among themselves and also ascertain the wishes of the creditors and contributories in accordance with section 289 (1) of the Companies Act.

Cases referred to:

(1) *In re Lundie Brothers Ltd.* [1965] 2 All E.R. 692.
(2) *Ebrahimi* v. *Westbourne Galleries Ltd.* [1973] A.C. 360.
(3) *Eng Mee Yong* v. *V. Letchumanan* [1979] 2 M.L.J. 212.
(4) *In re A.B.C. Coupler and Engineering Co.. Ltd.* [1962] 1 W.L.R. 1236.
(5) *Re Wondoflex Textile Pty. Ltd.* [1951] V.L.R. 458.
(6) *Re Straw Products* [1942] V.L.R. 139.
(7) *Re Metropolitan Fuel Pty. Ltd.* [1969] V.R. 328.

FEDERAL COURT.

P. Royan (Ker Kim Tim with him) for the appellant.

T. Thomas for the respondent.

V. Radha for the liquidator.

Cur. Adv. Vult.

Wan Suleiman F.J. (delivering the Judgement of the Court): This is an appeal from an order of the High Court made on February 25, 1983 that the appellant company be wound up.

The appellant company was incorporated on November 7, 1977 under the Companies Act, 1965 as a private company limited by shares.

The nominal capital of the Company was $400,000/- divided into 400,000 shares of $1/- each. The amount of the capital paid up or credited as paid up was $200,000/-.

The original subscribers to and first directors of the company were Tee Ah Kow ("Tee"), Mak Boon Seng ("Mak"), Chew Kee Hui ("Chew") and Ker Kim Tim @ Kerk Choo Ting ("Ker").

The Company at all material times carried on *inter alia* the business of manufacture and sale of window louvres at its factory situated at 82, Jalan Kilang Midah, Taman Midah, Jalan Cheras, Kuala Lumpur.

Tee is a distant relative of Tay Bok Choon.

Prior to February 15, 1980 Tee, Mak, Chew and Ker held 25,000 shares each in the Company.

Tee took the initiative to get to know the Respondent and approached the Respondent to purchase Chew's 25,000 shares.

Mak and Tee promised to appoint the Respondent as the Chairman of the Board of Directors of the Company if he agreed to purchase Chew's shares, and was duly made a chairman.

The Respondent bought Chew's 25,000 shares on or about February 29, 1980.

After the Respondent became a shareholder he, on behalf of the Company, approached Balfour Williamson (S) Pte. Ltd. ("Balfour") for financial assistance to the Company.

At a meeting of the Board of Directors of the Company on February 29, 1980 it was resolved that

(i) Chew's sale of 25,000 shares to the Respondent be approved.

(ii) Chew should resign as director.

(iii) The Respondent and his son Tay Hock Yam ("Tay") be appointed directors.

(iv) The allotment of 100,000 shares at $1/- each to Tee, Mak, Ker and the Respondent in equal proportion.

(v) All cheques issued by Company to be signed by Mak and counter-signed by 2 of the other directors.

Hence as at February 29, 1980 Tee, Mak, Ker and the Respondent held 50,000 shares in the Company. Together with Tay they formed the Board of Directors of the Company.

After the Respondent became a shareholder Balfour extended credit facilities to the Company.

The Respondent lent $25,000/- to Tee and $16,000/- to Mak. Mak has returned $1,500/- leaving a balance of $14,500/- unpaid. What is in dispute is the nature of the loans. The Respondent claims that the loans were to help Tee and Mak purchase the additional allotment of 25,000 shares which were issued to all the shareholders in February 1980. Tee and Mak claim that they were "friendly loans."

At a meeting of the Board of Directors of the Company on June 1, 1980 it was resolved that Tee, Mak and Tay be appointed executive (working) directors and that they be authorised to purchase machinery and equipment for the Company. It was further resolved that Mak be paid $1,200/- per month and Tee and Tay $900/- per month.

At a meeting of the Board of Directors of the Company on June 30, 1981 it was resolved that:-

(i) the Company approve the transfer of 10,000 shares each from Tee, Mak, Ker and the Respondent to Tay.

(ii) Tee retire as Chairman of the Board of Directors and the Respondent be appointed in his place.

(iii) the monthly salaries of Tee, Mak and Tay be increased to $1,500/- per month with effect from June 11, 1981.

At meetings of the Board of Directors of the Company held on July 26, 1981 and August 11, 1981 it was proposed and resolved that the Board of Directors' resolution of June 30, 1981 be revoked.

The alleged reason given by the Company for revoking the previous resolution was the condition imposed by the Ministry of Trade and Industry relating to the nationality of the Company's shareholders on the manufacturing licence granted to the Company to manufacture sewing machine studs and pressed metal parts on a jobbing basis at a proposed factory in Bangi.

The Respondent and Tay, through their solicitors, suggested that the difficulty over nationality of the shareholders referred to above could be removed by transferring the shares in question to Dr. Tan Tiong Hong, a Malaysian citizen. No response has been received to date to this suggestion.

By this time (August 1981) the shareholders and directors of the Company were divided into 2 factions. One faction comprised Tee, Mak and Ker ("the original shareholders"). The other consisted of the Respondent and his son, Tay. On both fronts, i.e. at meetings of shareholders and at meetings of directors the faction comprising the original shareholders by virtue of their superior voting power would and did get their way.

The original shareholders, the Respondent alleged, further acted to take complete control of the management of the Company by dismissing two clerks, a production executive and a storeman. In their place Ker's sister-in-law and other employees were employed. Mrs. Ker began to play an active role in the affairs of the Company and visited the factory frequently. The Respondent and Tay were not consulted in respect of these developments.

At a meeting of the Board of Directors held on September 23, 1981 Mak was appointed Managing Director of the Company and all "the executive powers of all the other directors" were terminated with immediate effect. It was further resolved that Mak be empowered to employ and dismiss all employees and to authorise the purchase and sale of all the Company's products. In effect it meant Mak assumed all the powers of the Board and became the supreme head of the Company. Thus from September 23, 1981 Tay ceased to be an employee of the Company.

At a meeting of the Board of Directors of the Company held on November 22, 1981 and November 27, 1981 it was resolved that Ker, the Respondent and Tay be removed from the Board of Directors. The resolution was carried by 3 to 1 with Tee, Mak and Ker voting for the resolution and the Respondent voting against. Thus the Respondent and Tay were excluded from the Board of Directors with effect from November 27, 1981.

Between November 27, 1981 and February 25, 1983 (date of winding-up order) the Respondent and Tay were not represented in the management of the Company.

Prior to 1980 the Company did not pay any dividends on its shares.

The Company paid out dividends for the first time in September 1982. This was after the winding-up petition was presented. The Respondent accepted his dividends ($9,000/-) on a without prejudice basis.

After the Respondent and Tay were excluded from management the Company at its 4th annual general meeting held on August 5, 1982 resolved to increase the remuneration of the 2 directors, Tee and Mak, from $1,500/- per month to $2,500/- per month. The Respondent and Tay did not receive the requisite notice calling the said meeting on August 5, 1982 and accordingly did not attend.

The foundation of Respondent's petition for a winding up order, Mr. Royan stressed was that he had joined the Company as a shareholder on the basis that he and his son would be given an equal share in the management of the business and that the other shareholders would not use their majority to outvote him on major issues.

The learned trial Judge agreed with the Respondent. He found that in substance a partnership existed between Respondent and the other three, and following *In re Lundie Brothers Ltd.*[1] held that any ground which would justify an order for the dissolution of a partnership would justify the winding up of this company. His Lordship cited extensively and with approval passages

from *Ebrahimi* v. *Westbourne Galleries Ltd.*[2] and said,

"Just as in the present case, the petitioner was removed from his directorship under a power valid in law. But the respondents did do him a wrong by excluding him from participation in the conduct of the business upon which they have embarked on the basis that all should participate in the management. In my judgment, I have come to the conclusion that I ought to make an order for winding up. The removal of the petitioner from his directorship was an unjustified exclusion of him from the partnership business."

An order for winding up on just and equitable grounds was, *inter alia,* made under section 218 (1)(i) of the Companies Act.

The law of Companies recognises the right in many ways to remove a director from a Board. We agree with Mr. Royan that generally a director cannot complain if he is removed from the Board or not re-elected after having retired by rotation so long as it is in accordance with the Articles of Association and/or the Companies Act, but in the words of Lord Wilberforce in *Ebrahimi's case* (at page 380) "The just and equitable provision nevertheless comes to his assistance if he can point to, and prove, some special underlying obligation of his fellow member(s) in good faith, or confidence, that so long as the business continues he shall be entitled to management participation, an obligation so basic that, if broken, the conclusion must be that the association must be dissolved."

The appellant says that such underlying obligation has not been pointed to and proved. Tee Ah Kow had specifically denied these allegations in paras. 9, 10 and 27 of his affidavit dated July 6, 1982. This and the subsequent affidavits of the parties show that there was a real dispute as to whether or not any assurances were given to the Petitioner/Respondent before he formed the Company.

In the face of the denial that this agreement was ever made, it was submitted that the trial Judge was in no position at all to come to a finding of fact without taking oral evidence which could be tested by cross-examination.

Whilst rules 26 and 30 of the Companies (Winding-up) Rules 1972 specifies that a winding-up petition shall be verified by affidavit, the courts can under O. 3 r. 2(3) of the Rules of the High Court, 1980 order attendance for cross-examination of persons making such affidavit, and section 221(2)(c) of the Companies Act empowers it at the instance of either party to direct the taking of oral evidence.

In *Eng Mee Yong* v. *V. Letchumanan,*[3] a decision of the Privy Council, at page 216 appears this passage:-

"Their Lordships must therefore turn to the evidence that was before the High Court on the hearing of the application, bearing in mind that if there appears to be any conflict of evidence which is not on the face of it implausible, such a conflict ought not to be disposed of on affidavit evidence only. It leaves a serious question to be tried."

Mr. Royan claims that because there is nothing vague, equivocal, self-contradictory or implausible about the denial by Tee of the alleged agreement, then affidavit evidence alone would be insufficient.

In re A.B.C. Coupler and Engineering Co. Ltd.[4] was another authority for the proposition that in cases of this sort the Court should require the petitioner to substantiate his case more fully by calling for oral evidence. At page 1243 Buckley J. said,

". . . . where grave charges are levelled against individuals in a winding up petition, or it may be, where the case is one of complexity turning upon the conduct of persons in a company, the court will not in the exercise of its discretionary jurisdiction, be satisfied with mere *prima facie* evidence as the statutory affidavit affords, but will require the petitioner to make out his case more fully."

Without going into detail we agree with Mr. Royan that the reasons given by the trial Judge for agreeing with what the Petitioner/Respondent alleged on this issue is not at all clear.

We need only mention one of the four reasons mentioned by Mr. Royan, to support his contention that had the trial Judge given the affidavits a more thorough scrutiny he could not have concluded that the agreement alleged by the Petitoner/Respondent was ever made.

At the E.G.M. of November 22, 1981 a resolution was passed to remove the Respondent and his son as directors, but no protest was made then that they should not be removed because of the alleged agreement. Moreover, a solicitor held proxy for him, and the solicitor wrote several letters before the petition was filed, and yet again, not a word about the agreement. The inescapable inference is that there was no such agreement.

Mr. Thomas suggests that the fact appellant was represented by counsel in the court below and yet made no application to examine the deponents should be held against him.

Order 38 rule 2(3) of the Rules of the High Court empowers the Court to examine the deponents regardless of the absence of such application, and we agree that in this instance it should have done so.

The winding-up order is without doubt a drastic remedy, a sledgehammer remedy and we would agree with Mr. Royan that even if the trial Judge had been right in his decision to make an order (which we are satisfied he is not) on mere affidavit evidence, he should have so indicated to the parties and given them an opportunity to reach an agreement among themselves as was done in *Re Wondoflex Textiles Pty. Ltd.*(5) and *Re Straw Products*(6) and also ascertain the wishes of creditors and contributories in accordance with section 289(1), as was done in *Metropolitan Fuel, Pty. Ltd.*(7)

We would therefore allow the appeal with costs here and below, and order the deposit to be returned to appellant. We would also postpone making any order regarding the liquidation costs.

Appeal allowed.

Solicitors: *Baharuddin, Bernatt, Tan & Ker; Skrine & Co.*

S & F INTERNATIONAL LIMITED v. TRANS-CON ENGINEERING SDN. BHD.

[F.C. (Lee Hun Hoe C.J. (Borneo), Mohamed Azmi & Abdoolcader F.JJ.) August 23 & September 17, 1984]

[Kuala Lumpur – Federal Court Civil Appeal No. 29 of 1984]

Practice and Procedure – Application for Mareva injunction – Principles and policy underlying Mareva order – Discretion of High Court judge – When appellate court will interfere – Pleadings of plaintiff.

In this case the appellant had entered into a contract with the National Electricity Board for the installation of electricity transmission lines in Perak and Kelantan. The appellant in turn subcontracted the execution of certain works and services relating to the installation of the transmission lines to the respondent. The respondent claimed the sum of $2,025,822.40 as the amount due and payable under the subcontract and this claim was supported by invoices. The respondent also claimed damages and additional costs "believed to be in the region of $4,500,000/-" the full particulars of which were to be notified. The respondent issued a writ against the appellant and also took out an *ex parte* notice of motion for a *Mareva* injunction against the appellant in respect of its moneys in two bank accounts, the plant machinery and the like at the work site and any moneys held to the account of the appellant under the main contract with the National Electricity Board. An order in terms was made with liberty to apply to set it aside. The appellant applied to set the order aside and after the hearing the order was varied by limiting the *Mareva* order only to the moneys held to the account of the appellant by the Board under the main contract. The appellant appealed and asked that the order be set aside or alternatively that it be limited to the sum of $2,025,822-40 only.

Held: (1) the discretion whether or not to grant an interlocutory injunction is vested in the High Court judge and not the appellate court whose function initially is one of review only and it will not overrule the decision of the judge at first instance unless, broadly speaking, he has made an error of law or misconceived the facts, and except in those circumstances it must defer to the judge's exercise of his discretion and must not interfere with it merely upon the ground that the members of the appellate court would have exercised the discretion differently;

(2) it would appear that on a consideration of the affidavit evidence the moneys due from the Board to the appellant are its only asset of any substance within the jurisdiction, that the respondent has in fact a strong arguable case on the facts in relation to the claim for moneys due and payable in the sum of $2,025,822-40 and that there is a risk of dissipation of the appellant's asset particularly in the light of the fact that its corporate structure infers that it is not to be relied upon. The learned Judge considered all these matters and stated that he was satisfied on the affidavit evidence and there is no reason or justification to interfere with the exercise of his discretion in this respect;

(3) there is no justification whatsoever for any protection by way of a *Mareva* order for the respondent in respect of its purported claim for damages and/or additional costs "believed to be in the region of $4,500,000-00 and the appellate court can on this aspect of the matter interfere with the judge's exercise of his discretion.

Cases referred to:–

(1) *Mareva Compania Naviera S.A.* v. *International Bulkcarriers S.A.* [1980] 1 All E.R. 213.

(2) *Zainal Abidin bin Haji Abdul Rahman* v. *Century Hotel Sdn. Bhd.* [1982] 1 M.L.J. 260.

(3) *PCW (Underwriting Agencies) Ltd.* v. *Dixon & Anor.* [1983] 2 All E.R. 158; C.A. [1983] 2 All E.R. 697.

(4) *Campbell Mussells & Ors.* v. *Thompson & Anor.* The Times dated May 30, 1984.

(5) *Ninemia Maritime Corporation* v. *Trave Schiffahrtsgesellschaft m.b.H. Und. Co* K.G. [1984] 1 All E.R. 398, on appeal to C.A. [1984] 1 All E.R. at p. 413; [1983] 1 W.L.R. 1412.

(6) *Duport Steels Ltd.* v. *Sirs* [1980] 1 W.L.R. 142.